

AMENDED IN ASSEMBLY AUGUST 15, 2005

AMENDED IN ASSEMBLY JULY 5, 2005

AMENDED IN ASSEMBLY JUNE 15, 2005

AMENDED IN SENATE MAY 3, 2005

AMENDED IN SENATE APRIL 12, 2005

SENATE BILL

No. 92

Introduced by Senator Murray

January 14, 2005

An act to add Section 22947.9 to the Business and Professions Code, relating to computer spyware.

LEGISLATIVE COUNSEL'S DIGEST

SB 92, as amended, Murray. Computer spyware: penalties.

Existing law prohibits a person or entity from, with actual knowledge, conscious avoidance of actual knowledge, or willfully, causing computer software to be copied onto a computer in California and using the software to (1) take control of the computer, as specified, (2) modify certain settings relating to the computer's access to or use of the Internet, as specified, (3) collect, through intentionally deceptive means, personally identifiable information, as defined, (4) prevent, without authorization, an authorized user's reasonable efforts to block the installation of or disable software, as specified, (5) intentionally misrepresent that the software will be uninstalled or disabled by an authorized user's action, or (6) through intentionally deceptive means, remove, disable, or render inoperative security, antispyware, or antivirus software installed on the computer. Existing law also prohibits a person or entity that is not an authorized user from inducing an authorized user to install a software component by

intentionally misrepresenting that it is necessary for security or privacy or in order to open, view, or play a particular type of content. Existing law prohibits a person or entity that is not an authorized user from deceptively causing the copying and execution on the computer of software components with the intent of causing an authorized user to use components in a way that violates any of these prohibitions.

This bill would, with specified exceptions, authorize a consumer who has computer software copied, installed, or executed on his or her computer in violation of these prohibitions, ~~an the consumer's~~ Internet service provider ~~who suffers direct injury as a result of or reasonably incurs necessary expenditures in response to a violation,~~ the Attorney General, or a district attorney to bring an action to recover actual damages or specified statutory damages. The bill would also make the violation of the prohibitions a crime, punishable as a misdemeanor. By creating a new crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 22947.9 is added to the Business and
- 2 Professions Code, to read:
- 3 22947.9. (a) In addition to any other remedies provided by
- 4 this chapter or by any other provisions of law, the following
- 5 persons may bring an action against a person or entity that has
- 6 violated this chapter:
- 7 (1) The Attorney General.
- 8 (2) A district attorney.
- 9 (3) A consumer who has computer software copied, installed,
- 10 or executed on his or her computer in violation of this chapter.
- 11 (4) An Internet service provider ~~that suffers direct injury as a~~
- 12 ~~result of, or reasonably incurs necessary expenditures in response~~
- 13 ~~to, the copying, installation, or execution of computer software in~~

1 ~~violation of this chapter, whether the direct violation was against~~
2 ~~the Internet service provider or a customer. provides Internet~~
3 ~~access services to a customer described in paragraph (3).~~

4 (b) An action brought under this section may seek actual
5 damages, or statutory damages of one thousand dollars (\$1,000),
6 for each instance of computer software copied, installed, or
7 executed on a consumer's computer in violation of this chapter,
8 up to a maximum of one million dollars (\$1,000,000) per
9 incident. ~~An Internet service provider may only recover statutory~~
10 ~~damages for a violation against a customer when the Internet~~
11 ~~service provider has suffered a direct injury or incurred a~~
12 ~~necessary expenditure in response to that violation.~~

13 (c) A violation of this chapter is a misdemeanor punishable by
14 a fine of not more than one thousand dollars (\$1,000) or
15 imprisonment in a county jail for not more than one year, or by
16 both that fine and imprisonment.

17 (d) No provider of computer software or of an interactive
18 computer service may be held liable ~~under this chapter~~ for
19 identifying, naming, removing, disabling, or otherwise affecting
20 a computer program through any action voluntarily undertaken or
21 service provided ~~that is intended in good faith to identify, prevent~~
22 ~~the installation or execution of, remove, or disable another~~
23 ~~computer program reasonably believed to violate this chapter that~~
24 ~~is installed on a computer of a customer of the provider, if the~~
25 ~~provider notifies an authorized user and obtains clear and~~
26 ~~conspicuous consent before undertaking that action or providing~~
27 ~~that service. if all of the following apply:~~

28 (1) *The provider intended to identify accurately, prevent the*
29 *installation of or execution of, remove, or disable another*
30 *computer program on a computer of a customer of the provider.*

31 (2) *The provider reasonably believed that the computer*
32 *program violated this chapter.*

33 (3) *The provider notified the authorized user and obtained*
34 *clear and conspicuous consent before undertaking the action or*
35 *providing the service.*

36 (4) *The provider evaluates computer programs based on*
37 *internal practices and procedures reasonably designed to*
38 *determine whether or not a computer program violates this*
39 *chapter.*

1 (5) *The provider has established a process for managing*
2 *disputes and inquiries regarding misclassification or false*
3 *positive identifications of computer programs.*

4 (e) *Nothing in this section is intended to limit the ability of the*
5 *Attorney General or a district attorney to bring an action against*
6 *a provider of computer software or of an interactive computer*
7 *service.*

8 (f) *Nothing in this section is intended to limit any rights under*
9 *existing law for a consumer who suffers direct injury or incurs*
10 *expenditures directly related to a provider's removal of a*
11 *computer program that the provider incorrectly identified as*
12 *violating this chapter.*

13 SEC. 2. No reimbursement is required by this act pursuant to
14 Section 6 of Article XIII B of the California Constitution because
15 the only costs that may be incurred by a local agency or school
16 district will be incurred because this act creates a new crime or
17 infraction, eliminates a crime or infraction, or changes the
18 penalty for a crime or infraction, within the meaning of Section
19 17556 of the Government Code, or changes the definition of a
20 crime within the meaning of Section 6 of Article XIII B of the
21 California Constitution.